No. 05-823

In The
Supreme Court of the United States

MONTANA SPORTS SHOOTING ASSOCIATION, INC., GARY S. MARBUT, AND DR. PHILLIP BARNEY,

Petitioners,

v.

GALE A. NORTON, Secretary, United States Department of the Interior; UNITED STATES DEPARTMENT OF THE INTERIOR; KATHLEEN CLARKE, Director, Bureau of Land Management; MAT MILLENBACH, Montana State Director Bureau of Land Management; and BRUCE W. REED, Field Manager, Malta Field Office, Bureau of Land Management,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, even though private defendants bear the formidable burden of proving that it is absolutely clear that the voluntary cessation of their illegal conduct moots a case, government officials bear no such burden when they voluntarily cease their illegal conduct, contrary to *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216 (2000), *relying on Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 165 (2000)?

LIST OF PARTIES

The caption of this case contains the names of all the parties to this Petition.

CORPORATE DISCLOSURE STATEMENT

Montana Shooting Sports Association, Inc. ("Montana Hunters") is a non-profit corporation. It has no parent or publicly held companies owning 10 percent or more of its stock. Its purpose is to support and promote firearm safety, shooting sports, and hunting.

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OPINIONS BELOW

Montana Hunters seek review of the Order of the U.S. Court of Appeals for the District of Columbia Circuit, entered June 14, 2005, granting Secretary Norton's Motion for Summary Affirmance of the District Court's Order dismissing this case as moot, reproduced at App. 1-2. Montana Hunters reproduce the D.C. Circuit's Order, entered September 28, 2005, denying their Petition for Rehearing *En Banc* at App. 7-8; and the Memorandum Opinion and Order of the U.S. District Court for the District of Columbia at App. 3-6. These Orders were not published.

JURISDICTION

Supreme Court Rule 13.3 and 28 U.S.C. § 1254(1) vest this Court with jurisdiction to review the Order for which Montana Hunters seek timely filed review.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Article III, Section 2 of the United States Constitution:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their authority. . . .

STATUTORY PROVISIONS INVOLVED

Although, on the merits, this case involved various provisions of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701, *et seq.*, and the Endangered Species Act (ESA), 16 U.S.C. §§ 1533, *et seq.*, it was dismissed as moot under Article III of the Constitution.

STATEMENT OF THE CASE

On October 18, 1999, the U.S. Department of the Interior, through the Bureau of Land Management (BLM) ("Interior"), without notice or opportunity for public comment, issued a Closure Order regarding 20,000 acres of public lands in Montana ("40 Complex") to the discharge or use of firearms, purportedly to protect habitat of black-footed ferrets, a non-essential experimental population of endangered species. App. 9-11. The use of the closed land is governed by the *Judith Valley Phillips Resource Area Resource Management Plan* (RMP), adopted pursuant to FLPMA, which allows for multiple uses, including, specifically, the discharge of firearms and sport shooting of prairie dogs. Nonetheless, Interior, relying on 43 C.F.R. § 8364.1, summarily, unilaterally, and illegally effected a *de facto* amendment to the RMP by closing 20,000 acres of land to the discharge of firearms.

Montana Hunters filed suit asserting that Interior's Closure Order violated both the public involvement provisions of FLPMA and the critical habitat provisions of the ESA. Montana Hunters sought a declaration that 43 C.F.R. § 8364.1 could not be used to circumvent FLPMA and the ESA, that any termination of uses allowed by an RMP must be accomplished in accordance with FLPMA,

and that any closure to such permitted uses to protect habitat must be done in accordance with the ESA.

On or about August 12, 2002, Montana Hunters filed a Motion for Summary Judgment. While that motion was pending, the State of Montana, through its Department of Fish, Wildlife & Parks (FWP), undertook to manage prairie dogs. App. 12. Thereupon, Montana FWP prohibited the shooting of prairie dogs in the 40 Complex. Interior then withdrew its Closure Order but expressly reserved the right to "implement a land closure . . . in accordance with 43 C.F.R. § 8364.1" in the event FWP determined to "rescind or significantly modify" its rule banning the shooting of prairie dogs. App. 13-15. The current Montana FWP ban expires in February 2006, unless reenacted.

Interior then moved to dismiss Montana Hunters' case as moot, or, in the alternative, for Summary Judgment on the merits, claiming that 42 C.F.R. § 8364.1 excused Interior from complying with FLPMA and the ESA. The District Court dismissed the case as moot, Montana Hunters appealed, and Interior filed a Motion for Summary Affirmance, which the U.S. Court of Appeals for the District of Columbia Circuit granted in a one-paragraph *per curiam* decision.

In its opinion, the D.C. Circuit declined to rely on *Laidlaw, supra* and on *Adarand, supra*, which set forth the burden imposed on private and governmental actors who seek to moot a case by the voluntary cessation of their illegal conduct. Instead, the D.C. Circuit applied *National*

Black Police Association v. District of Columbia,[1] ruling that the cessation of illegal conduct moots a case unless plaintiffs prove the illegal conduct is virtually certain to recur. Montana Hunters' motion for rehearing *en banc*, in which they brought the D.C. Circuit's attention to the conflict with this Court's *Laidlaw* and *Adarand* rulings, was denied.

REASONS FOR GRANTING THIS PETITION

I. THE D.C. CIRCUIT'S HOLDING CONFLICTS WITH THIS COURT'S DECISIONS IN *LAIDLAW* AND *ADARAND*.

A. THE D.C. CIRCUIT IGNORED *LAIDLAW* AND *ADARAND*.

The D.C. Circuit failed to apply *Laidlaw*'s and *Adarand*'s stringent scrutiny of voluntary cessation of illegal conduct in a mootness claim, and ignored the formidable burden those rulings place on defendants to demonstrate that it is absolutely clear that the voluntary cessation of their illegal conduct will not be abandoned. Instead, ignoring *Laidlaw* and *Adarand*, the D.C. Circuit held that, when government is the defendant, mootness is presumed from the cessation itself. Thus, the D.C. Circuit required that Montana Hunters prove that it is virtually certain that such illegal conduct will again recur, rather than requiring Interior to prove that it is absolutely clear that its illegal conduct will not recur, as the D.C. Circuit, under *Laidlaw* and *Adarand*, is required to do. The D.C. Circuit, like the Fourth and Tenth Circuits, which were overruled

[1] 108 F.3d 346 (D.C. Cir. 1997).

by *Laidlaw* and *Adarand*, confused mootness with standing and made a distinction between governmental and private entities, a distinction specifically rejected by this Court in *Adarand*.

The D.C. Circuit relied exclusively on *National Black Police*, reciting therefrom: "The mere power to reenact a challenged law is not sufficient basis on which a court can conclude that a reasonable expectation of recurrence exists."[2] Thus, *National Black Police* presumes mootness *per se* from the mere cessation of the government's illegal conduct, and erroneously places the burden of proving its likely recurrence on the plaintiff, holding: "[T]here must be evidence indicating that the challenged law likely will be reenacted."[3] Indeed, it held that "a statutory change . . . is usually enough to render a case moot . . . unless [plaintiff proves that] it is virtually certain that the repealed law will be reenacted."[4] The D.C. Circuit here, as it did in *National Black Police*, presumed that Interior's cessation of its challenged action rendered the case moot *per se* and imposed on Montana Hunters the heavy burden of proving that it is "virtually certain" that Interior will again issue its illegal Closure Order.

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[2] 108 F.3d at 349.

[3] *Id.* Moreover, this case, even if it survived *Laidlaw* and *Adarand*, is inapposite because it involved a change to legislation by a legislative body, with notice and opportunity for public comment, which is entirely dissimilar from the agency action taken unilaterally here by Interior.

[4] 108 F.3d at 349 (quoting from *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994).

B. *LAIDLAW* IMPOSES A FORMIDABLE BURDEN ON PARTIES WHO VOLUNTARILY CEASE THEIR ILLEGAL CONDUCT.

Like the Fourth Circuit in *Laidlaw*, the D.C. Circuit panel here confused mootness and standing and thus placed the burden on Montana Hunters to prove that it was "virtually certain" that the illegal closure procedure would once again be applied by Interior. But though *Laidlaw* recognized that the Fourth Circuit's "confusion [was] understandable, given this Court's repeated statements that the doctrine of mootness can be described as 'the doctrine of standing set in a time frame,'" it also made clear that such "description . . . is not comprehensive."[5]

Laidlaw requires a distinction between standing and mootness, rejecting the "standing set in a time frame" concept of mootness that still confuses some circuit courts, as it did the D.C. Circuit here. *Laidlaw* held that:

> [The] standard [of review] we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is stringent [and] [t]he defendant bears a heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again.[6]

Laidlaw then summarized its holding:

> [A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of

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[5] 528 U.S. at 190.

[6] *Id.* at 189.

> showing that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.[7]

This Court then distinguished the burden of proving standing, which belongs to plaintiffs, from that of proving mootness, which is borne by defendants, saying: "There are circumstances in which the prospect that a defendant will . . . resume harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness."[8]

Ignoring *Laidlaw*, the D.C. Circuit applied the burden of proof for establishing initial standing; that is, it required Montana Hunters to prove that it was "virtually certain" that Interior would once again utilize the same illegal procedure to close public land to uses allowed under an RMP. Not surprisingly, given that holding and the D.C. Circuit's confusion of mootness with standing, the D.C. Circuit found the likelihood of recurrence "too speculative." However, because Montana Hunters had filed suit and had demonstrated standing before the Closure Order was withdrawn, and because Interior had defended its right to reissue the Closure Order by utilizing the same illegal procedure, *Laidlaw* requires that the "formidable burden" of proving that it is "absolutely clear" that Interior will not again utilize this procedure in violation of FLPMA and the ESA should have been placed squarely on Interior. The D.C. Circuit's failure to do so irreconcilably conflicts with *Laidlaw*.

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[7] *Id.* at 190.

[8] *Id.*

C. *ADARAND* REQUIRES APPLICATION OF *LAIDLAW* TO GOVERNMENTAL ENTITIES AS WELL AS PRIVATE PARTIES.

Interior's contention, and the D.C. Circuit's conclusion, that *Laidlaw* applies only to private parties was rejected by this Court in *Adarand*, decided the same day as *Laidlaw*. *Adarand* applied *Laidlaw*'s "stringent" scrutiny to the Secretary of the U. S. Department of Transportation and the Administrator of the Federal Highway Administration. It also placed on them the "formidable burden" of proving mootness. It held that, like the Fourth Circuit, "the Tenth Circuit 'confused mootness with standing,' [citing *Laidlaw*] and as a result placed the burden of proof on the wrong party."[9] The Court held that, even when agencies of the United States are involved, "voluntary cessation of challenged conduct moots a case . . . only if it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'"[10] *Adarand* required the federal government to shoulder the "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again."[11]

The D.C. Circuit here, like the Fourth and Tenth Circuits, overruled by *Laidlaw* and *Adarand*, "confused mootness with standing" and, therefore, improperly placed the burden of proving the likelihood of recurrence on Montana Hunters. *Adarand* conclusively established that the D.C. Circuit's solicitude for government is impermissible and that the presumption is to the contrary. *Adarand*

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[9] 528 U.S. at 221.

[10] *Id.*

[11] *Id.*

conclusively established that Interior is subject to the same stringent scrutiny and bears the same formidable burden of proving mootness as that placed on private parties. The D.C. Circuit's ruling here is in irreconcilable conflict with *Adarand*.

D. THE D.C. CIRCUIT IGNORED *LAIDLAW*'S HOLDING THAT ONLY A PERMANENT CESSATION OF ILLEGAL CONDUCT MOOTS A CASE.

Montana FWP's ban is, by its own terms, a one-year moratorium.[12] Interior's withdrawal of its Closure Order, in which Interior reserved the right to close the area again by summary, unilateral, illegal action at any time Interior deemed it necessary, was undertaken because of this moratorium. Thus, Interior's cessation of its illegal conduct is, by its own terms, not permanent. *Laidlaw* holds that voluntary cessation of conduct must be permanent to moot a case.[13] Thus, the D.C. Circuit's decision irreconcilably conflicts with *Laidlaw* and *Lyons*.

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[12] To be sure, another moratorium may be enacted in one year, and each year thereafter. But each such enactment is, by its own terms, no more than another moratorium.

[13] 528 U.S. at 190 (a "moratorium by its terms was not permanent," in which event there remained the "prospect that a defendant will engage in (or resume) harmful conduct."); *accord*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 97-98 (1983) ("[T]he case is not moot, since the moratorium by its terms is not permanent [and so] intervening events have not irrevocably eradicated the effects of the alleged violation.").

II. THE D.C. CIRCUIT IS YET ANOTHER IN A GROWING NUMBER OF CIRCUITS THAT REFUSES TO APPLY *ADARAND*.

With its ruling here, the D.C. Circuit becomes the third court of appeals to refuse to apply *Laidlaw* to governmental entities as required by this Court's ruling in *Adarand*.

In *Federation of Advertising Industry Representatives, Inc. v. City of Chicago*, the Seventh Circuit ruled that the formidable burden of persuasion placed on defendants by *Laidlaw* applies only to private defendants and not to the government, whose voluntary cessation is presumed to moot the case:

> We do not dispute that [*Laidlaw*'s] proposition is the appropriate standard for cases between private parties, but this is not the view we have taken toward acts of voluntary cessation by government officials. Rather, when defendants are public officials . . . we place greater stock in their acts of self-correction . . . .[14]

The Seventh Circuit justified this rejection of the express holding of *Laidlaw* by lamenting that to hold otherwise would "put this court in the position of presuming that the City has acted in bad faith – harboring hidden motives to reenact the statute after we have dismissed."[15] The Seventh Circuit then concluded:

> Rather than presuming bad faith, we have repeatedly held that the complete repeal of a challenged law renders a case moot, unless there is

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[14] 326 F.3d 924, 929-930 (7th Cir. 2003).

[15] *Id.*

> evidence creating a reasonable expectation that the City will reenact the ordinance or one substantially similar.[16]

In *Ammex, Inc. v. Cox*, the Sixth Circuit recognized that *Laidlaw* dictates that voluntary cessation of conduct moots a case only if it is proved that "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," and "the heavy burden of demonstrating mootness rests on the party claiming mootness."[17] Nonetheless, the Sixth Circuit held, contrary to *Adarand*, that this rule of law did not apply to government: "On the other hand we have noted that 'cessation of the allegedly illegal conduct by government officials has been treated with more solicitude by the courts than similar action by private parties.' "[18]

Thus, the D.C. Circuit, like other circuit courts that have ruled on claims of governmental mootness, continues to confuse mootness and standing, disregards *Adarand*, and places the burden of proving mootness on the wrong party.

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[16] *Id.* Here, of course, no legislation is even involved. Rather there is only an illegal regulation published by a governmental agency and illegal action taken by the agency. Moreover, reenactment of legislation requires public involvement.

[17] 351 F.3d 697, 705 (6th Cir. 2003).

[18] *Id.*

CONCLUSION

This Court, in *Laidlaw* and *Adarand*, requires that government officials, when they seek to render a lawsuit moot by the voluntarily cessation of their illegal conduct, must prove that it is absolutely clear that their illegal conduct will not recur. Nonetheless, the D.C. Circuit refused to follow *Laidlaw* and *Adarand*. In so doing, it became the third court of appeals to ignore this Court's rulings. This Court should grant this Petition to rectify this conflict with its precedent.

Respectfully submitted,

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APPENDIX INDEX

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 04-5434 **September Term, 2004**
01cv02011

(Filed On: Jun. 14, 2005)

Montana Shooting Sports Association, Inc., et al.,

Appellants

v.

Gale A. Norton, Secretary, et al.,

Appellees

BEFORE: Edwards, Randolph, and Garland, Circuit Judges.

ORDER

Upon consideration of the motion for summary affirmance, the response thereto, and the reply, it is

ORDERED that the motion be granted. The merits of the parties' positions are so clear as to warrant summary action. *See Taxpayers Watchdog. Inc. v. Stanley*, 819 F.2d 294, 297 (D.C.Cir.1987) (per curiam). The mere possibility that appellees might issue another closure order if the State of Montana rescinds its own regulations governing recreational firearm use in Complex 40 is too speculative to support a "reasonable expectation" that appellees will issue another closure order. *Cf. National Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997) ("the mere power to reenact a challenged law is not a sufficient basis on which a court can conclude that a

reasonable expectation of recurrence exists"). Moreover, rescission of the closure order has completely and irrevocably eradicated the effects of the alleged violation. *See National Black Police Ass'n*, 108 F.3d at 350.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

/s/ [Illegible]
/s/ [Illegible]
/s/ [Illegible]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MONTANA SHOOTING SPORTS ASSOCIATION, INC., et al.	)	
Plaintiffs,	)	**Civil Case No. 01-2011 (RJL)**
v.	)	
NORTON, et al.	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER
(September 29, 2004) [# 23, # 26]

(Filed Sep. 29, 2004)

Montana Shooting Sports Association, Inc., an association created for the purpose of supporting, promoting, and educating its members regarding firearms and firearm safety, together with its president and another active member bring this lawsuit against the Department of the Interior, the Secretary of the Interior, the Bureau of Land Management ("BLM"), the director of BLM, the director of BLM in the State of Montana, and the BLM Montana field manager to challenge a Closure Order of public lands in Montana. Before the Court are plaintiffs' Motion for Summary Judgment and defendants' Cross-Motion for Summary Judgment or in the Alternative to Dismiss. Upon due consideration of the parties' motions, the Court DENIES the plaintiffs' Motion for Summary Judgment, and GRANTS the government's Motion to Dismiss the complaint with prejudice for lack of subject matter jurisdiction.

BACKGROUND

In 1992, the BLM issued the *Judith Valley Phillips Resource Management Plan Environmental Impact Statement* ("the Plan"). Am. Compl. ¶ 15. The Plan established how 2.8 million acres of land in north-central Montana would be managed. Pl. Mot. for Summ. J. at 3. A portion of these lands, known as "40 Complex," contains 20,000 acres of public land that was open to multiple uses, including hiking, camping, hunting, and recreational shooting of unregulated wildlife. *Id.*

The black-footed ferret has been on the endangered species list since 1967. Am. Compl. ¶ 12. In an effort to further establish the species, the Fish and Wildlife Services ("FWS") published final rules in 1994 to reintroduce the black-footed ferret into Montana as a nonessential experimental population. Am. Compl. ¶ 16. Under the rules, FWS would release annually at least 20 surplus black-footed ferrets into the defined experimental population area, which included 40 Complex. The process would be repeatable thereafter for two to four years, or until the species was established. Am. Compl. ¶¶ 19-20.

A significant portion of the experimental population area contained prairie dog populations, which are essential to the reintroduction of the black-footed ferret. *Id.*; Am. Compl. ¶ 46. After the reintroduction plan was in place, however, the prairie dog populations in the experimental population areas began to decline. Def. Mot. Summ. J. at 7. In response, the BLM published a Closure Order in October 1999 that closed the public lands within the 40 Complex to the "discharge or use of firearms." Am. Compl. ¶ 23. The stated purpose of the order was "to

protect [the] habitat for the reintroduction of the black-footed ferret." Am. Compl. ¶ 24.

In February 2002, Montana's Department of Fish, Wildlife, and Parks imposed seasonal restrictions on shooting prairie dogs and prohibited the shooting of the prairie dogs on black-footed ferret reintroduction sites. Def. Mot. Summ. J. at 8. And, in September 2002, the BLM rescinded the Closure Order because it was no longer necessary since the State had assumed responsibility for the management of the prairie dog population. Def. Mot. Summ. J. at 8.

ANALYSIS

Article III of the Constitution permits federal courts to decide only actual, ongoing cases and controversies. *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1989). To establish a justiciable controversy, the plaintiff "must have suffered, or be threatened with, an actual injury traceable to the defendant," which is capable of being redressed by a favorable judicial decision. *Id.* If, however, there are intervening events that "make it impossible to grant the prevailing party with effective relief," then the case becomes moot and the court no longer has jurisdiction. *Burlington N. R.R. Co. v. Surface Transp. Bd.*, 75 F.3d 685, 688 (D.C. Cir. 1995).

In this case, plaintiffs seek declaratory and injunctive relief from the Closure Order issued by the BLM. Since the plaintiff filed this action, however, the BLM determined that intervening actions by the State of Montana rendered the Closure Order unnecessary, and it rescinded the order on September 3, 2002. As a result, this Court is unable to award any form of effective relief that is not

already accomplished by the BLM's rescission of the Closure Order.[1] The plaintiffs have obtained everything that they could recover by a judgment of this Court in their favor, and their challenge is therefore moot.

ORDER

For the reasons set forth above, it is this 29th day of September, 2004 hereby

ORDERED that the plaintiff's Motion for Summary Judgment [# 23] is **DENIED**, and it is further

ORDERED that the defendant's Motion to Dismiss [# 26] is **GRANTED** and the above-captioned case be dismissed with prejudice.

SO ORDERED.

/s/ Richard J. Leon
RICHARD J. LEON
United States District Judge

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[1] The voluntary cessation of allegedly illegal conduct does not necessarily deprive a court of jurisdiction. But, the voluntary cessation of conduct will render a case moot if "there is no reasonable expectation . . . that the alleged violation will recur," and intervening events have eradicated the effects of the alleged violation. *County of Los Angeles v. Davis*, 440 U.S. 625, 630 (1978) (internal quotations and citations omitted). The facts in this case do not fit within the voluntary cessation exception to the mootness doctrine because the BLM rescinded the challenged order and there is no reasonable expectation that the order could have any future effect. And, although plaintiffs assert that the defendants' allegedly illegal conduct could recur, the defendants have only asserted that they reserve the right to take future action that they are legitimately empowered to do using a valid procedure.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-5434 **September Term, 2005**

01cv02011

Filed On: Sep. 28, 2005

Montana Shooting Sports Association, Inc., et al.,
Appellants

v.

Gale A. Norton, Secretary, et al.,
Appellees

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Roberts,* Brown and Griffith, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

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* Circuit Judge Roberts did not participate in this matter.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

64 Fed. Reg. 56213

NOTICES

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MT-923-1150-AA]

Closure of Public Lands

Monday, October 18, 1999

***56213** AGENCY: Bureau of Land Management, Malta Field Office, DOI.

ACTION: Notice.

SUMMARY: Notice is hereby given that effective immediately, the area described below is closed to the discharge or use of firearms. This closure only affects public lands. The areas closed are described as the 40 Complex between Dry Fork and Beauchamp Creek and an area south of Pea Ridge in south Phillips County, Montana. The public lands in the 40 Complex include: T. 24 N., R. 27 E., sec. 20, all; sec. 21, all; sec. 25, all; sec. 26, all; sec. 27, all; sec. 28, all; sec. 29, N 1/2 and SE 1/4 ; sec. 34, all; sec. 35, all; T. 24 N., R. 28 E., sec. 31, lots 1 through 4 inclusive, E 1/2 W 1/2 and E 1/2 ; sec. 32, all; T. 23 N., R. 27 E., sec. 1, lots 1 through 4 inclusive, S 1/2 N 1/2 and S 1/2 ; sec. 2, lots 1 through 4, S 1/2 N 1/2 and S 1/2 ; sec. 3, lot 1, SE 1/4 NE 1/4 and E 1/2 SE 1/4 ; sec. 10, E 1/2 NE 1/4 and NE 1/4 SE 1/4 ; sec. 11, all; sec. 12, all; sec. 13, all; T. 23 N., R. 28 E., sec. 5, lots 1 through 4 inclusive, S 1/2 N 1/2 and S 1/2 ; sec. 6, lots 1 through 7 inclusive, SE 1/4 NW 1/4, S 1/2 NE 1/4, SE 1/4, and E 1/2 SW 1/4 ; sec. 7, lots 1 through 4 inclusive, E 1/2 W 1/2 and E 1/2 ; sec. 8, all; sec. 17, all; sec. 18, lots 1 through 4 inclusive, E 1/2 W 1/2 and

E 1/2 ; which included prairie dog colonies B040, B041, B042, B043, B045, B047, B069, B072; and B148. The public lands in the area south of Pea Ridge includes T. 22 N., R. 29 E., sec. 9, all; sec. 10, all; sec. 11, all; sec. 13, all; sec. 14, all; sec. 15, all; sec. 17, E 1/2 and S 1/2 SW 1/4 ; sec. 20, N 1/2 and SE 1/4 ; sec. 21, all; sec. 22, all; sec. 23, all; sec. 24, all; sec. 25, all; sec. 26, all; sec. 27, all; sec. 28, all; sec. 29, all; T. 22 N., R. 30 E., sec. 18, lots 1 through 4 inclusive, E 1/2 W 1/2 and E 1/2 ; sec. 19, lots 1 through 4 inclusive, E 1/2 W 1/2 and E 1/2 ; sec. 30, lots 1 through 4 inclusive, E 1/2 W 1/2 and E 1/2 ; which includes prairie dog colonies B095, B096, B090, B111, B163 and B164. Signs noting this closure will be placed at strategic access points around the area and maps depicting the area are available to the public at the Bureau of Land Management's Malta Field Office in Malta, Montana, 501 South Second East. Telephone 406-654-1240.

The purpose of the closure is to protect habitat for the reintroduction of the endangered black-footed ferret (MUSTELA NIGRIPES). That habitat is black-tailed prairie dog (CYNOMYS LUDOVICIANUS) colonies. The area within the closure has been identified as a key reintroduction site for black-footed ferrets because of the presence of viable black-tailed prairie dog colonies in close proximity to each other. Prairie dogs are critical *prey* species for ferrets and the number of prairie dogs has declined in recent years. The closure area has been identified to protect the prairie dog population from further decline due to recreational shooting. The area will remain closed until further notice. The authority for this closure is found in 43 CFR 8364.1.

In accordance with 43 CFR 8364.1(b)(4), persons who hold valid authorization from the Montana Department of

Fish, Wildlife and Parks to hunt big game, upland game birds, or waterfowl may use or discharge firearms in the closed area for the purpose of taking these permitted animals in accordance with the applicable state regulations. Authorized personnel of the Bureau of Land Management, Animal Plant Health Inspection Service, state and, local law enforcement agencies, and other emergency services are exempt from this closure when executing their official duties.

In accordance with 43 CFR 8360.0-7, persons who violate this closure may be subject to a fine not to exceed $1,000 and/or imprisonment not-to-exceed 12 months.

DATES: October 18, 1999.

LOCATION: Public lands in south Phillips County, Montana.

FOR FURTHER INFORMATION CONTACT: Richard M. Hotaling, Field Manager, Malta Field Office, Bureau of Land Management. HC 65 Box 5000, 501 South Second Street East, Malta, Montana 59538-0047, 406-654-1240.

Dated: October 7, 1999.

John E. Moorhouse
Acting Deputy State Director,
Division of Resources.

Administrative Rules of Montana

12.2.501 NONGAME WILDLIFE IN NEED OF MANAGEMENT (1) The following nongame wildlife species are determined by the department to be nongame wildlife in need of management within the meaning of the Nongame and Endangered Species Conservation Act, 87-5-101, MCA, et seq.:

(a) crayfish – Pacifasticus spp ; Orconectes spp. ;

(b) freshwater mussels – all species of Pelecypoda ;

(c) yellow perch – Perca flavescens ;

(d) crappie – Pomoxis ;

(e) black-tailed prairie dogs – Cynomys ludovicianus ;

(i) under 87-5-102, MCA, department management of black-tailed prairie dogs applies to public lands only; and

(f) white-tailed prairie dogs – Cynomys leucurus ;

(i) under 87-5-102, MCA, department management of white-tailed prairie dogs applies to public lands only.

(2) Management regulations for these species will be issued annually by the department. (History: 87-1-301, 87-5-105, MCA; IMP , 87-1-301, 87-5-105, MCA; NEW , Eff. 9/4/75; AMD , 1977 MAR p. 946, Eff. 11/26/77; AMD , 1979 MAR p. 1388, Eff. 11/16/79; AMD , 1989 MAR p. 26, Eff. 1/13/89; EMERG , AMD , 1991 MAR p. 2032, Eff. 11/1/91; AMD , 1993 MAR p. 953, Eff. 5/14/93; TRANS , from ARM 12.5.301, Eff. 6/30/93; AMD , 1995 MAR p. 1571, Eff. 8/11/95; AMD , 2002 MAR p. 526, Eff. 3/1/02.)

697 Fed. Red. 56299

NOTICES

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MT-099-1150-MQ]

Notice Rescinding the October 18, 1999, Shooting Area Closure in South Phillips County, MT

Tuesday, September 3, 2002

***56299** AGENCY: Bureau of Land Management, Interior.

ACTION: Rescinding Notice of Closure.

SUMMARY: The Bureau of Land Management (BLM) on October 18, 1999, closed about 26,500 acres of public land to the discharge or use of firearms. The areas closed are described as the 40-Complex between Dry Fork and Beauchamp Creek, and an area south of Pea Ridge in south Phillips County, Montana. The purpose of the closure was to protect habitat for the reintroduction of the endangered black-footed ferret (Mustela nigripes). That habitat is black-tailed prairie dog (Cynomys ludovicianus) colonies.

House Bill 492 (HB 492) was passed by the Montana Legislature to allow the Montana Fish, Wildlife, and Parks (FWP) to manage black and white-tailed prairie dogs on Bureau of Land Management lands. Further action by FWP consisted of amending Administrative Rules of Montana (ARM) 12.2.501, to include black-tailed and white-tailed prairie dogs in the definition of non-game wildlife in need of management. The FWP Commission approved the adoption of the proposed ARM rule on January 24, 2002, and FWP filed the ARM adoption notice

on February 20, 2002. Part of this rule making was to place a seasonal shooting closure on all BLM lands in Montana for black-tailed prairie dogs and a year-round shooting closure on black-footed ferret reintroduction sites. Since FWP has placed a year-round shooting closure on black-footed reintroduction sites, BLM's 1999 shooting closure is no longer required to protect the habitat for the black-footed ferret.

The BLM lands in the 40-Complex include:

T. 24 N., R. 27 E., sec. 20, all; sec. 21, all; sec. 25, all; sec. 26, all; sec. 27, all; sec. 28, all; sec. 29, N 1/2 and SE 1/4; sec. 34, all; sec. 35, all.

T. 24 N., R. 28 E., sec. 31, lots 1-4, E 1/2 W 1/2 and E 1/2; Sec. 32, all.

T. 23 N., R. 27 E., sec. 1, lots 1-4, S 1/2 N 1/2 and S 1/2; sec. 2, lots 1-4, S 1/2 N 1/2 and S 1/2; sec. 3, lot 1, SE 1/4 NE 1/4 and E 1/2 SE 1/4; sec. 10, E 1/2 NE 1/4 and NE 1/4 SE 1/4; sec. 11, all; sec. 12, all; sec. 13, all.

T. 23 N., R. 28 E., sec. 5, lots 1-4, S 1/2 N 1/2 and S 1/2; sec. 6, lots 1-7, SE 1/4 NW 1/4, S 1/2 NE 1/4, SE 1/4, and E 1/2 SW 1/4; sec. 7, lots 1-4; E 1/2 W 1/2 and E 1/2; sec. 8, all; sec. 17, all; sec. 18, lots 1-4, E 1/2 W 1/2, and E 1/2.

This includes the following prairie dog towns: B040, B041, B042, B043, B045, B047, B069, B072, and B148.

The BLM lands in the area south of Pea Ridge include:

T. 22 N., R. 29 E., sec. 9, all; sec. 10, all; sec. 11, all; sec. 13, all; sec. 14, all; sec 15, all; sec. 17 E 1/2 and S 1/2

SW 1/4; sec. 20, N 1/2 and SE 1/4; sec. 21, all; sec. 22, all; sec. 23, all; sec. 24, all; sec. 25, all; sec. 26, all; sec. 27, all; sec. 28, all; sec. 29, all.

T. 22 N., R. 30 E., sec. 18, lots 1-4, E 1/2 W 1/2 and E 1/2; sec. 19, lots 1-4, E 1/2 W 1/2 and E 1/2; sec. 30, lots 1-4, E 1/2 W 1/2 and E 1/2.

This includes the following prairie dog towns: B095, B096, B111, B163, and B164.

BLM would consider appropriate actions if FWP decides to rescind or significantly modify the Annual Rule Regulating Prairie Dog Shooting on Public Lands. This could include implementing a Land Use Closure on the 40-Complex and/or any other black-footed ferret reintroduction site under BLM administration to protect black-footed ferrets and the associated habitat in accordance with *43 CFR 8364.1.*

The effective date of rescinding this closure is the date the notice is published in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Bruce Reed at 406-654-5100.

Authority: *43 CFR 8364.1*

Dated: June 17, 2002.

Bruce W. Reed,

Field Manager, Bureau of Land Management.